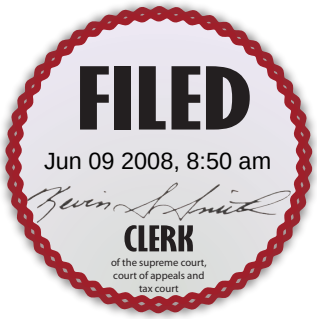

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IN THE COURT OF APPEALS OF INDIANA

JACKIE R. GUFFEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A01-0801-CR-14
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Michael D. Peyton, Judge
Cause No. 33D01-0708-FA-6

June 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jackie R. Guffey appeals his conviction and sentence for Possession of a Schedule IV Controlled Substance,[1] a class D felony. Specifically, Guffey argues that the trial court erred by (1) admitting evidence allegedly discovered in violation of his Fourth Amendment rights and (2) enhancing his sentence for a habitual offender finding that was based on a prior conviction that cannot serve as the basis for such a finding. In light of the State's concession that the trial court's habitual offender finding and sentence enhancement were erroneous, we affirm in part, reverse in part, and remand with instructions contained herein.

FACTS

On August 29, 2007, Henry County Sheriff's Department Detective Josh Smith and Newcastle Police Department Detective Aaron Strong were patrolling in an unmarked police vehicle for the Area Drug Task Force when they observed Gregory Choate driving a red moped. Within the previous few weeks, the police department had received multiple anonymous tips that a Caucasian male on a red moped had been dealing drugs. Additionally, Detective Strong recognized Choate from a prior investigation where Choate had been arrested for dealing drugs. The detectives followed Choate and saw him park in a parking lot. Choate began talking on his cell phone and Detective Strong noticed that he "kept looking over his shoulders, both left and right, appearing kind of nervous, kind of suspicious." Tr. p. 186.

[1] Ind. Code §§ 35-48-2-10, -4-7.

Guffey called Choate's cell phone and asked Choate to meet him to sell him some Oxycontin. Guffey suggested meeting at another location, and Choate left the parking lot. The detectives followed Choate, who stopped at a liquor store for five minutes. While in the liquor store's parking lot, the detectives saw Choate enter into "some type of transaction" with an unidentified man. Id. at 115.

Choate left and drove to the parking lot where he was supposed to meet Guffey. Choate pulled into the parking lot and stopped next to a vehicle where Guffey was in the front seat. Detectives Strong and Smith were approximately thirty to sixty feet from Choate and Guffey when Guffey exited his vehicle and approached Choate. Guffey asked Choate if he could get the Oxycontin, and Choate said, "Yeah." Id. at 96-97. Guffey returned to his vehicle to get money and paid Choate for the drug. The detectives saw Choate pocket the money and believed that Choate had delivered drugs to Guffey because Choate appeared to be holding something in his hand that he handed to Guffey when Guffey gave him money. Guffey returned to his vehicle and Detectives Strong and Smith called uniformed officers for assistance. Choate parked his moped in front of a neighboring residence and the detectives lost sight of him.[2]

Officer Tony Floyd quickly arrived at the scene. Guffey told the officer that he had "arrived too soon [because Guffey] had given a guy fifty bucks to go buy some dope . . . [but he] had not made it back yet." Id. at 152. Guffey immediately asked to speak to a narcotics officer so that he could provide the police with information. Officer

[2] Officers found Choate later that day and arrested him. He entered into a plea agreement with the State and testified at Guffey's trial.

Floyd contacted Detective Strong, who told Officer Floyd to bring Guffey to his office at the Criminal Investigation Division. Guffey was not under arrest when he was transported to Detective Strong's office.

Upon arriving at the office, Detective Strong asked Guffey to empty his pockets. Guffey presented the detective with, among other things, a pocketknife. Upon seeing the pocketknife, Detective Strong asked Guffey to remove his shoes. When Guffey removed his shoes, a cellophane wrapper containing approximately twenty green pills fell onto the floor. After seeing the pills, Detective Smith advised Guffey of his Miranda[3] rights. Guffey asked Detective Strong if he could just throw the pills away and became angry when Detective Strong told him that he could not. Guffey told the detectives that "he was just going to get ten dollars for that s***." Id. at 125. Guffey continued to speak to the detectives and Detective Strong cautioned him several times that what he said could be used against him. Guffey refused to address whether he wanted to sign a waiver of his rights or whether he wanted a lawyer. Thus, the detectives ended the conversation and arrested Guffey. Laboratory tests conducted on the pills revealed that they were diazepam, a schedule IV controlled substance.

On August 31, 2007, the State charged Guffey with four drug-related offenses. On October 25, 2007, the State alleged Guffey to be a habitual offender. On November 5, 2007, Guffey filed a motion to suppress the "items illegally seized from [Guffey] at the time of, or subsequent to his arrest in this cause, along with all statements taken

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

derivatively from that arrest." Appellant's App. p. 70. Guffey argued that he had been detained, arrested, and searched without probable cause, without a warrant, and without his consent. The trial court held a hearing that day. Guffey admitted that he had continued to make statements to the detectives after he had been advised of his Miranda rights. Tr. p. 79. The trial court ultimately denied Guffey's motion to suppress, concluding that the pills "would have invariably been found during a search of [Guffey] at the jail upon booking [and that Detective] Strong indicated that [Guffey] was clearly in custody." Appellant's App. p. 78. With regard to Guffey's statements, the trial court concluded that

> there is no evidence, including from [Guffey] that he ever stated that he did not want to talk to the officers. Further, there is no evidence that [Guffey] ever asked to talk to a lawyer. Nor is there any evidence that [Guffey], after engaging in conversation with the officers, wished to stop that conversation. In fact, the evidence indicates that the interview was terminated by the officers and not [Guffey].

Id. at 78-79.

A jury trial was held on November 6, 2007, and the contested evidence was admitted over Guffey's objection. The jury ultimately found Guffey guilty of class D felony possession of a schedule IV controlled substance. The habitual offender phase of the trial followed, and Henry County Probation Officer Tim Jackson testified that Guffey had prior convictions for burglary and dealing in marijuana. The trial court found Guffey to be a habitual offender. The trial court held a sentencing hearing on February 11, 2008, and sentenced Guffey to two and one-half years imprisonment for his conviction. It

enhanced that sentence by three and one-half years imprisonment for the habitual offender finding. Guffey now appeals.

DISCUSSION AND DECISION

I. Evidence of Drugs

Guffey argues that the trial court erred by denying his motion to suppress evidence of the pills that were found after he removed his shoes. Specifically, he argues that the detectives' request for Guffey to remove his shoes[4] "exceeded the scope of a Terry search when . . . there was no fear for officer safety." Appellant's Br. p. 5.

Because Guffey did not file an interlocutory appeal challenging the trial court's denial of his motion to suppress, he may not now challenge that ruling on appeal. Kelley v. State, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). Instead, the issue is more appropriately framed as whether or not the trial court abused its discretion by admitting the evidence at trial.[5] A trial court has broad discretion in ruling on the admissibility of evidence and we will reverse such a ruling only for an abuse of that discretion. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. An abuse of discretion generally occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. Id. We do not reweigh the evidence and we consider

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[4] The evidence in the record shows that Guffey may have also removed his socks after the detectives asked him to remove his shoes. Tr. p. 199. While Guffey may have taken the request a step further by also removing his socks, there is nothing in the record that suggests that the detectives instructed him to do so. Thus, we will only address the propriety of the detectives' request that Guffey remove his shoes.

[5] Because Guffey does not articulate an argument regarding the trial court's denial of his motion to suppress statements he made to the detectives while at the office, we will not address any issue regarding the trial court's admission of evidence regarding those statements.

conflicting evidence in a light most favorable to the trial court's ruling. Marlowe v. State, 786 N.E.2d 751, 753 (Ind. Ct. App. 2003).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by the government. State v. Atkins, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005). When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. Coleman v. State, 847 N.E.2d 259, 262 (Ind. Ct. App. 2006), trans. denied. One such exception is that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts and rational inferences drawn from those facts, the intrusion is reasonably warranted and the officer has reasonable suspicion that criminal activity may be afoot. Moultry v. State, 808 N.E.2d 168, 170-71 (Ind. Ct. App. 2004) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

While Guffey focuses his argument on the Terry stop exception to the warrant requirement, Terry "applies to cases involving a brief encounter between a citizen and police officer on a public street." Atkins, 834 N.E.2d at 1032 (emphasis added) (citing Illinois v. Wardlow, 528 U.S. 119, 123 (2000)). Because Guffey's encounter leading to the drug discovery occurred inside Detective Strong's office at the Criminal Investigation Division, Terry does not apply. See Malone v. State, 882 N.E.2d 784, 787 (Ind. Ct. App. 2008) (holding that because the police encounter with the defendant occurred on private property, Terry does not apply); Atkins, 834 N.E.2d at 1032 (same).

Guffey asked to talk to a narcotics officer after he was confronted in the parking lot. Tr. p. 153. He was not under arrest at the time he was taken to Detective Strong's office. Id. at 156. Once at the office, Detective Strong asked Guffey to "empty his pockets to make sure he had no weapons on him." Id. at 196. Guffey removed a pocketknife from his pocket. Id. at 198. At that point, Detective Strong asked Guffey to remove his shoes "for [the officers'] safety since we are in street clothes, we do not wear police vests" and he wanted to be sure that Guffey "remove[d] his shoes [to make] sure he had no, no other items that could be used for bodily harm . . . ." Id. at 199.

After concluding that Terry did not apply to the facts of Malone v. State, we noted that

> [o]fficer safety is of paramount importance. Police officers are daily placed in difficult and dangerous situations, some of which are life threatening. The law has to provide protections for such officers. At the same time, in a free society there must be a reasonable basis for a warrantless search of our persons and homes; hence, our constitutional protections against unreasonable searches and seizures. Between these extremes, courts engage in a very difficult undertaking balancing these competing values and determining where the line separating the reasonable and unreasonable should be drawn.

882 N.E.2d at 787. Because the detectives were about to talk with Guffey at his request, it was reasonable for Detective Strong to ask him to empty his pockets to ensure that he did not have weapons. And after Guffey presented them with a pocketknife, it was reasonable for Detective Strong to ask him to remove his shoes to ensure that he did not have any additional weapons on his person. Thus, we conclude that the search did not violate Guffey's Fourth Amendment rights and the trial court did not abuse its discretion by admitting evidence of the pills at trial.

II. Habitual Offender Sentence Enhancement

Guffey argues that that trial court improperly enhanced his sentence because of a habitual offender finding that violates Indiana Code section 35-50-2-8(d).[6] The State concedes that Guffey's prior conviction for dealing in marijuana "cannot form the basis for a habitual offender enhancement" because "a dealing conviction does not count if the crime was not classified as violent under Indiana Code section 35-50-2-2(b)(4), and the defendant has only one or no convictions for dealing illegal drugs." Appellee's Br. p. 19, 20. Thus, we must reverse the trial court's finding that Guffey was a habitual offender and remand to the trial court with instructions to amend the abstract of judgment to remove the erroneous finding and amend the sentencing order to remove the three and one-half year habitual offender sentence enhancement and impose a sentence of two and one-half years imprisonment for Guffey's conviction.

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[6] Indiana Code section 35-50-2-8(d) provides:

> (d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:
>
> ***
>
> (3) all of the following apply:
> (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
> (B) The offense is not listed in section 2(b)(4) of this chapter.
> (C) The total number of unrelated convictions that the person has for:
> (i) dealing in or selling a legend drug under IC 16-42-19-27;
> (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
> (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
> (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3; and
> (v) dealing in a schedule V controlled substance (IC 35-48-4-4);
> does not exceed one (1).

The judgment of the trial court if affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and ROBB, J., concur.